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THE WATUPPA POND CASES.

MOST of the New England rivers which furnish valuable water-power are fed at some point in their course by large ponds. Many of the smaller streams draw practically their whole supply from such sources. These ponds, owing to the purity of their water and their favorable location, are also peculiarly available for supplying cities and towns with water for domestic and other uses. Of the two hundred and twenty-two acts passed in Massachusetts prior to 1886, authorizing municipalities or other corporations to take water for the supply of cities or towns, many granted the right to take water from these large ponds. This diverson of the water for the purpose of supplying cities or towns reduces, of course, the flow in the ponds and the outlet streams, and in every such act a provision was inserted to secure compensation to persons injured by so taking the water, as in all other cases of the taking of property by right of eminent domain. The chief claims for damages made under these statutes have been on behalf of the owners of the water-power on the outlet streams.

In 1871 the Massachusetts Legislature authorized the city of Fall River to take from North Watuppa Pond, for domestic and other uses, fifteen hundred thousand gallons of water daily. North and South Watuppa Ponds are connected by a narrow passageway, and form together a body of water of some thirty-three hundred

acres. Through the Quequechan or Fall River, a stream of about two miles in length, these ponds empty into the tide water. In the last half-mile of its course the Quequechan has a fall of nearly one hundred and thirty feet, and is occupied by a succession of valuable mill privileges. The taking of the water of the ponds under the act of 1871 materially reduced the flow in the Quequechan, and heavy damages were assessed in favor of the mill-owners. When, in 1886, the city of Fall River had occasion to ask the Legislature for leave to take an additional supply of water from the ponds, the idea was conceived of avoiding the payment of compensation for injury to these mill-owners. The proposed bill purported to relieve the city from "liability to pay any other damages than the State itself would be legally liable to pay," provided that "parties holding in respect of said pond any privileges or grants heretofore made and liable to revocation or alteration by the State shall have no claim against said city in respect of water drawn under this grant," and annulled "any privileges heretofore enjoyed in respect of said pond," so far as inconsistent with the act. On the day before the close of the session, the bill, having passed both Houses, reached the Governor, who returned it to the Senate, where it originated, on the ground that it authorized the taking of private property without providing compensation. In the hurry of the last day of the session the bill was passed over the Governor's veto.[1] The city of Fall River at once proceeded to take additional water from the Watuppa Ponds, without making compensation to the mill-owners on the Quequechan, and suits were brought by them and by the Watuppa Reservoir Company (a corporation organized for the purpose of controlling and regulating the water in the ponds and on the stream) to restrain the city of Fall River from taking water under the act.[2]

By a majority of four to three,[3] the Supreme Judicial Court of Massachusetts ordered that the bills be dismissed. All the judges apparently admitted that, according to the common law, the Legislature could not authorize the taking of the water of a pond without providing for compensation for damages done the riparian owners on the outlet stream by a diminution of its flow. But the

[1] Mass. St. 1886, c. 353.

[2] Watuppa Reservoir Co. *v.* City of Fall River; Troy Cotton and Woollen Manufactory *v.* City of Fall River. Supreme Judicial Court of Massachusetts, Oct. 29, 1888.

[3] Morton, C. J., Devens, Field, and Holmes, JJ., against W. Allen, C. Allen, and Knowlton, JJ.

majority of the court were of the opinion that these cases were taken out of the general rule, because the North Watuppa is a "great pond," and governed by the provisions of the Massachusetts Colony Ordinance and Ancient Charter of 1641-7, which has become a part of the general law of Massachusetts, and provides as follows :—

LIBERTIES COMMON.

1. It is ordered, by this court decreed and declared; That every man, whether inhabitant or foreigner, free or not free, shall have liberty to come to any publick court, council or town meeting, and either by speech or writing to move any lawful, seasonable or material question, or to present any necessary motion, complaint, petition, bill or information whereof that meeting hath proper cognizance, so it be done in convenient time, due order and respective manner. (1641.)

2. *Every inhabitant who is a householder, shall have free fishing and fowling in any great ponds*, bays, coves and rivers, so far as the sea ebbes and flows within the precincts of the town where they dwell, unless the freemen of the same town or the general court have otherwise appropriated them.

Provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed.

The which clearly to determine;

It is declared, that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoyning, shall have propriety to the low water-mark, where the sea doth not ebbe above a hundred rods, and not more wheresover it ebbs further:

Provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands.

And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowle there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow. (1641,47.)

3. Every man of, or within this jurisdiction, shall have free liberty (notwithstanding any civil power) to remove both himself and his family at their pleasure out of the same, provided there be no legal impediment to the contrary. (1641.)[1]

In the year 1869 the State of Massachusetts relinquished all its rights to ponds of less than twenty acres' area, so that, since 1869

[1] Colonial Laws of Massachusetts, p. 90.

only ponds of at least twenty acres are to be deemed "great ponds."[1]

The doctrine which has received the sanction of the majority of the Supreme Judicial Court of Massachusetts presents a new danger to the mill-owners of a great manufacturing community. In reliance upon the general opinion and the unbroken legislative practice of many years, that the right to the uninterrupted flow of water in a natural stream, whatever its source, is absolute property, entitled to all the protection afforded by the Constitution, riparian lands and flowage rights have been purchased, and factories, great in extent and number, have been erected upon nearly every stream in Maine and Massachusetts, which is favorably situated and capable of furnishing water-power. Now, the mill-owners, who have made their investments in reliance upon a continuous supply of water, learn, for the first time, that when the stream furnishing their power happens to come from or flow through a "great pond," the only hope of protecting their property lies in a watchful oversight of the Legislature, as it meets from year to year, to prevent legislation which may take away their property. Already the precedent set by the act of 1886 in favor of the city of Fall River has been followed by statutes granting similar rights to several cities and towns.[2] Still others are said to have been merely awaiting the decision in the Watuppa Pond cases before making application to the Legislature for like privileges. The importance of the decision is not confined to Massachusetts. The Colony Ordinance of 1641–47 is also a part of the law of Maine, and the reasoning of the majority of the court might well be applied to the navigable waters of other States. It is, we are told, proposed to have the decision reviewed upon writ of error to the Supreme Court of the United States. This fact, taken in connection with the importance of the subject, may justify an examination of the grounds of the decision.

Before entering upon such examination it may be well to recall the following rules of law governing the rights of riparian owners at common law: —

I. The right to the use of a stream of water is incident to the

[1] St. of 1869, c. 384.

[2] Ayer, Stats. 1887, c. 152, § 4; Malden, ib., c. 416, § 5; New Bedford, ib., c. 114, § 1; Ashburnham, Stats. 1888, c. 398, § 4; Maynard, ib., c. 407, § 4; Millbury, ib., c. 404, § 4.

land through which it passes. In the absence of controlling rights acquired by grant or prescription the riparian owners on a stream are entitled to the natural flow of the water without any diminution or obstruction except such as is incident to its reasonable use by the proprietors above. The water of the stream cannot lawfully be diverted, except for such use, unless it is returned again to its accustomed channel before it reaches the land of the proprietor below.[1]

II. The diversion of the waters of a spring which is the source of a stream is equally a wrongful diversion of the waters as against a riparian proprietor on the stream as if the water had been taken lower down. The rule is the same where the source of the stream is a lake or pond, instead of a spring; for a pond is part of a natural watercourse, collected from springs and the adjacent watershed, on its way to the sea. The inflow from the springs and sources must be at least as large as the outflow by the stream, so that, all the time, it is moving and running water, and no owner of the land over which the water passes, no matter what may be the rate of its flow, has the right to divert it or diminish it to the injury of a riparian proprietor below.[2]

III. The right of the riparian owner to the undiminished flow of the stream is property within the meaning of the Constitution,[3] and the Legislature cannot, even for a public purpose, like supplying a city with water, authorize the taking of this property — that is, authorize the diversion or diminution of the water naturally flowing in the stream — without providing for compensation to the riparian proprietors whose rights are thereby injuriously affected.[4]

It is therefore clear, as appears to have been admitted by all the members of the court in the recent Watuppa Pond cases, that the Legislature would not have had the right to authorize the taking of the water from the pond to the injury of the riparian pro-

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[1] Elliot *v.* Fitchburg R. R. Co., 10 Cush. 191; Thurber *v.* Martin, 2 Gray, 394; Chandler *v.* Howland, 7 Gray, 348; Ware *v.* Allen, 140 Mass. 513.

[2] Dudden *v.* Guardians of the Poor, 1 H. & N. 627; Hebron Gravel Road Co. *v.* Harvey, 90 Ind. 192; Bennett *v.* Murtaugh, 20 Minn. 151.

[3] Cary *v.* Daniel, 8 Met. 466; Wadsworth *v.* Tillotson, 15 Conn. 366; Harding *v.* Stamford Water Co., 41 Conn. 87.

[4] Pumpelly *v.* Green Bay Co., 13 Wall. 166; Ipswich Mills *v.* County Commissioners, 108 Mass. 363; Lee *v.* Pembroke Iron Co., 57 Me. 481.

prietors on the Quequechan, if the North Watuppa Pond had been a pond of less than twenty acres.

The reasoning upon which the majority of the court in the cases under consideration base the right of the State to authorize the diversion of the waters of a "great pond" without making compensation is, in substance, as follows:—

"The colonies and the provinces derived their rights from the king under their several charters. These charters vested in the grantees not only the right of soil, but also large powers of government and the prerogatives of the crown in the seashores, bays, inlets, rivers and other property which were held for the use and benefit of all the subjects." Upon the organization of the State government all these rights became vested in the Commonwealth. The State, therefore, "has not only the *jus privatum*, the ownership of the soil, but also the *jus publicum* and the right to control and regulate the public uses to which the ponds shall be applied." The Colony Ordinance of 1641–7 defines "great ponds." "Although fishing and fowling are the only rights named in the ordinance, it has always been considered that its object was to set apart and devote the great ponds to public use," and the devotion to public use is sufficiently broad to include every such use as it arises. The riparian owners upon the outlet stream hold their land subject to the rights in "great ponds" reserved by the State. The grant of the right to take the water for the use of a city without making compensation is a public use. Consequently riparian owners on the outlet stream have no redress for the taking of the water of the pond.

The minority of the court rest their dissent upon the following ground: "The ordinance secures to the Commonwealth, in great ponds, the same kind of ownership in the water that an individual purchaser of the entire area of a small pond could get by a perfect deed or by an original grant from the government without restrictions. If this pond had no outlet his title to the water in it would enable him to use it in any way he might choose. The water in such a pond would permanently appertain to the *locus*, and would belong as entirely to the owner of the place in which it accumulated as the land itself by which it was supported. If his pond happened to be a link in a chain through which water made its course from the mountains to the sea, his ownership of the water would give him only the reason-

able usufruct of it as it was passing by. He could not consume it, or put it out of visible existence as he might the solid land within his purchase, because such a use of it would be inconsistent with the right of his neighbors to enjoy their real property in its natural state. In this view, in order to describe the quality of his ownership, it is sometimes said that a riparian proprietor has no title to the water itself of a running stream, but only to the usufruct of it. In a sense that is true; in another sense he has a perfect title to the water, considered as water of a stream; for the property is real estate naturally moving in a defined course, and he has as good a title as it is possible to have, in view of the nature of the subject to which it relates. Merely as an owner, and apart from the exercise of sovereignty, which has no relation to these cases, the Commonwealth could have no better."

The issue between the majority and the minority of the court thus resolves itself into the single question whether the ownership by the State of the waters of "great ponds" is something different and more extensive than the ownership by a private individual of a small pond.

It will be noted that the majority of the court rest their declaration of these larger rights of the public in "great ponds" not upon any peculiar proprietary interest of the State in the soil under the pond, but upon the sovereign and governmental rights which the State holds as trustee for the public. Obviously the mere ownership by a private individual of the soil under a pond or stream gives no right to the appropriation of the waters themselves, and it would hardly be contended that the State would stand in a more favorable position than a private owner, so far as merely its proprietary interest in the soil is concerned. No authority could be found for the proposition that the proprietary interest of a State in a piece of land in which it owns the fee is not held subject to the same limitations as that of a private owner — sometimes expressed in the maxim, *sic utere tuo ut alienum non lædas*. It would hardly be supposed that the State, any more than a private individual, could dig on its land to the injury of adjacent land, or maintain a nuisance thereon. The proprietary interest of the State in water flowing over its land must be limited, as in the case of a private individual,— to its reasonable use as it passes by; in other words, so far as the proprietary interest of the State is con-

cerned, no property in the water itself can be predicated. This seems to be admitted by all the members of the court.

If, then, the rights of the State in the waters of a "great pond" are held to be different or more extensive than the absolute grant of a small pond would confer upon a private person, the basis of such exceptional rights must be found in the sovereign powers of the State over its waters, and in Massachusetts we should expect to find such sovereign rights defined either (1) by the words of the Colony Ordinance itself, or (2) in the practical interpretation given to it by universal custom and legislative practice, or (3) in the legal interpretation of its provisions by the judiciary.

(1.) The ordinance does not, by its terms, purport to reserve to the State any exceptional rights. It merely secures to the public the right of "free fishing and fowling" in "great ponds," and authorizes them "to pass and repass on foot through any man's propriety for that end, so that they trespass not upon any man's corn or meadow," and provides that no town shall appropriate to any particular person or persons any "great pond." In other words, the ordinance declares that the towns, in parcelling out their real estate, shall retain their great ponds, and, instead of reserving the right to use this property to the privileged few, the ordinance dedicated the ponds to the use of the public generally for the purposes named. We fail, therefore, to find in the words of the ordinance itself any foundation for the assertion by the State of the right to drain a "great pond" without making compensation to the riparian proprietors on the outlet stream.

(2.) There is no general custom, long acquiesced in, upon which such a claim of right can be based; on the contrary, the universal custom and the unbroken legislative practice in Massachusetts had proceeded upon the theory that the Commonwealth did not possess this extraordinary right in great ponds. It is admitted, in the opinion of the majority of the court, that the act of 1886, c. 353, granting to the city of Fall River the power to take the water, introduced a new policy into the legislation of Massachusetts.

(3.) The decisions prior to the cases under examination do not establish any exceptional rights in the State. For two hundred and ten years after the enactment of the ordinance no case was decided which undertook to determine what the rights in "great ponds" were. In 1851 the object of the provisions in the ordi-

nance relating to "great ponds" was first announced by Chief Justice Shaw, and since then numerous cases involving the interpretation of these clauses of the ordinance have been decided.

In Commonwealth *v.* Alger, 7 Cush. 53, 68 (1851), Chief Justice Shaw says: "In analyzing this ordinance, which thus appears as one act, it appears that that part of it which relates to free fishing and fowling in all great ponds, and in creeks, coves and rivers where the sea ebbs and flows, was taken word for word from the 'Body of Liberties,' section 16." . . . "The great purpose of the 16th article of the 'Body of Liberties' was to declare a great principle of public right, to abolish the forest laws, the game laws, and the laws designed to secure several and exclusive fisheries, and to make them all free."

In Cummings *v.* Barrett, 10 Cush. 186, 188 (1852), an action by a riparian owner on the outlet stream against a littoral owner on the pond for diminishing the supply of water by cutting ice, Chief Justice Shaw first indicated, *obiter*, what the rights of riparian owners on an outlet stream of a pond might be. "By the Colony Ordinance of 1641, Ancient Charters, 148, 149, all great ponds, which are defined to be ponds of over ten acres, are declared public; and, though lying within any town, shall not be appropriated to any particular person or persons. We are not aware that this ancient law has ever been altered. What the rights are of adjacent or riparian owners of land bordering on such ponds, has, we believe, never been the subject of adjudication or discussion. Some rights, we suppose, have always been exercised by such proprietors, such as a reasonable use of the water, for domestic purposes, and for watering cattle. But in the advanced state of agriculture, manufactures, and commerce, and with the increased value of land and all its incidents, there will probably be hereafter increased importance to the question, whether and to what extent such riparian proprietors have a right to the use of the waters, for irrigating land, for steam-engines, for manufactories which require a large consumption of water, and for the supply of their own ice-houses, for delivery to neighbors, and for more distant traffic.

"In a case between the owners of a mill with the privilege of a mill stream, and the riparian owner of land, on a large pond, supplying such mill stream, the nearest analogy perhaps, and that is apparently a strong one, is to that of riparian proprietors, on a running stream."

In Tudor *v.* Cambridge Water Works, 1 Allen, 164 (1861), the bill in equity set forth that complainant was the owner of about forty-eight acres of land under Fresh Pond, in Cambridge, containing about one hundred and eighty-three acres; and also of the shore adjoining and of the outlet of the pond and of the land under and on both sides of the same; that he and those under whom he claimed had for more than forty years taken ice from that portion of the surface of the pond now belonging to him, as an article of merchandise, and that the right to take ice is of great value; that the defendants' act of incorporation gave them no right to take water from the pond to the injury of the plaintiff; that a late statute authorized defendants to take water for the purpose of supplying the inhabitants of Cambridge, provided that they should not at any time draw below low-water mark, and further authorized defendants to take, hold and convey land, water or water rights, under limitations and for purposes therein expressed, provided that before entering upon land or water rights, or taking any water of any persons or corporation, they should file their petition to this court, praying for the appointment of commissioners to assess damages, if any; that such commissioners had not been appointed, nor had defendants filed such petition, but they had entered upon water rights of plaintiff and had taken and drawn off water from his land, and diverted the water from his outlet, by means whereof his right to take ice and his fish rights were injured. To this bill the defendants filed a general demurrer, and their counsel argued that, as there was no averment that water had ever been drawn below low-water mark, the right granted to defendants to take the water to that extent was independent of private rights, because "the Legislature had the right to provide that the defendants might take water from the pond for the purpose specified, without payment of damages. It is a great pond, and by the Colonial Ordinance of 1641 such ponds shall not be appropriated to any particular person. They remain, therefore, the property of the Commonwealth." The court overruled the demurrer on the ground that the bill stated a sufficient case for the interposition of equity to prevent a nuisance, and the demurrer admitting, as it did, the facts stated to be true, the court could not "assume that the defendants have not infringed on the private property and rights of the plaintiff, nor that he had no such title or right as averred in the bill." On the point taken by counsel the court say: "If he [the complainant]

is the owner of such rights as he avers, then the defendants have no authority to take them without suitable compensation; nor can the Legislature give to the defendants any power to appropriate them without affording a remedy to the plaintiff, by which he can recover the value of his property, which has been thus taken for a public use." Thus the court met the earliest intimation that the State, through its so-called ownership of great ponds, could take their waters to the detriment of private rights, without compensation.

Inhabitants of West Roxbury *v.* Stoddard *et al.*, 7 Allen, 158 (1863), was an action by the town of West Roxbury against the defendants for entering upon Jamaica Pond and carrying away a large quantity of ice which the plaintiffs claimed was theirs by virtue of their ownership of the pond. The plaintiffs maintained that, by the act of May 3, 1636, the territory which includes Jamaica Pond was granted to the town of Roxbury; that, by this grant and the authority conferred on towns by the acts of 1635 and 1684, the fee of the land on which the pond lies, including the water of the pond, vested in that town; that subsequently, in 1851, on a division of the town, the title passed to West Roxbury. The defendants owned land on the borders of the pond, and without permission, and in the face of express prohibition from the town, proceeded to cut and carry away ice as merchandise. The court gave judgment for the defendants, taking the ground that, assuming the fee in the land to be in the town of West Roxbury, as claimed, that fact did not prevent the Ordinance of 1641–1647 from applying to the pond, because "the towns were public bodies, organized for public purposes; and any property granted to them, which had not been conveyed to private persons, they might rightfully, by the law and usage of the colony, be required to devote to such public uses as the legislative authority should, by general laws, designate and determine." Hence "great ponds, containing more than ten acres, which were not before the year 1647 appropriated to private persons, were by the colony ordinance made public, to lie in common for public use," . . . "whether at that time included in the territory of a town or not." In delivering this opinion, the court declare, for the first time, the purposes, other than those specifically enumerated in the ancient ordinance, for which the great ponds are to be deemed to be devoted to public use, in the following language: "The uses which may be made

of the water of ponds and lakes in Massachusetts, by littoral proprietors, have never been judicially determined; but by long and well-established usage they are undoubtedly numerous. Cummings *v.* Barrett, 10 Cush. 188. With the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, become capable of many others which are within the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all, as they arise. . . . Fishing, fowling, boating, bathing, skating or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds, to all persons who own lands adjoining them or can obtain access to them without trespass, so far as they do not interfere with the reasonable use of the pond by others, or with the public right, unless in cases where the Legislature have otherwise directed."

It will be noted that the so-called ownership by the public of the pond is, so far as the rights are thus set forth, practically an easement to use the pond in a reasonable manner for any of the purposes for which *as a pond* it is serviceable, and that it does not extend beyond the rights which a private individual would in Massachusetts possess in a pond of less than twenty acres owned by him.

In Paine *v.* Woods, 108 Mass. 160 (1871), a complaint under the mill acts for overflowing, by means of a dam, a tract of land bounded on a "great pond," the law of "great ponds" is likened to that of tide waters, and thereby the ownership of the State in lands underneath the pond is impliedly affirmed.

In Fay *v.* Salem and Danvers Aqueduct Co., 111 Mass. 27 (1872), the plaintiff was a littoral proprietor on a "great pond," and sought damages from an aqueduct corporation to which the Legislature had granted the right to draw water from the pond. The act provided for the payment of damages suffered by any one by the taking of the water. The plaintiff complained that, by the withdrawal of the water from the pond, his house was rendered uncomfortable, and unfit for the purposes for which it was designed. The petition was dismissed. This case is cited by the majority of the court in the recent Watuppa Pond cases as similar to the one at bar. But the explanation of the decision given in Fay *v.* Salem and Danvers Aqueduct Co., in the dissenting opinion, shows that the

case cannot be relied upon to support the conclusion reached by the majority of the court. Referring to that case, Mr. Justice Knowlton says: "His petition was dismissed on two grounds. One was that such an injury was too remote to be the subject of an assessment of damages under the statute, and the other that he had no private right of property in the pond. It has been held in several of the above-cited cases that the public, as well as the land-owners along a great pond, may make a reasonable use of it for obtaining water, and for fishing, fowling, bathing, boating and skating. In other words, every member of the community who can gain access to it has the same rights in it that riparian proprietors commonly have in similar ponds. It was therefore decided that a land-owner upon it, whose land comes only to the water's edge, has in it no separate right, but only a right as one of the public. That which would otherwise be his private right is held to be merged in his public rights. See Lyon *v.* Fishmongers' Co., 10 Ch. App. 679. It follows, therefore, that when the Legislature grants those rights to an individual or corporation, it does not deprive him of property. He is presumed to have bought his land knowing that he could acquire no property in the pond, and trusting to the probable preservation of the public rights for his enjoyment of it.

"But these decisions do not touch the question whether the owner of land upon a watercourse below can be deprived of water by diversion at the fountain head. Mr. Justice Gray says, in the opinion in the case which we are considering, that the Legislature 'had full authority to grant the right to an aqueduct corporation to take and conduct the water of the pond for the use of the inhabitants of towns in the neighborhood; making due compensation for any private property taken for this public use.' But the cases I have cited show that depriving a riparian proprietor upon a running stream of the use of water, by diverting it at a pond above, is taking his property, within the meaning of those words in the constitution. This very case, therefore, recognizes the constitutional requirement of compensation to those whose water rights are taken in this way." . . .

"In Fay *v.* Salem and Danvers Aqueduct, *ubi supra*, it is said of the water that 'the Legislature, and the respondents acting under their authority, had the right to take and draw it off for the public use.' But this was merely a statement of their right in reference to the petitioners, who had no rights in it, and not of a general

right to take it without compensation as against riparian proprietors upon a stream below. For not only is the necessity to make compensation for property so taken recognized in a former part of this opinion, but the statute under which the suit was brought provided for it, and the court expressly held, in an opinion by Chief Justice Bigelow in a former suit between the same parties, that the taking of this very water was an exercise of the right of eminent domain. Statute 1850, chapter 273. Fay *v.* Salem and Danvers Aqueduct, 9 Allen, 577."

That the real ground upon which the decision in Fay *v.* Salem and Danvers Aqueduct Co., 111 Mass. 27, rests, was the remoteness or the peculiar nature of the damage suffered by the petitioner, and not the right of the Commonwealth to drain the pond at its pleasure without making compensation, appears from Bailey *v.* Inhabitants of Woburn, 126 Mass. 416 (1879), and Watuppa Reservoir Co. *v.* Fall River, 134 Mass. 267 (1883). Both were petitions by riparian owners on the outlet stream of "great ponds" for damages to their water rights, by the taking of the water from the ponds for supplying the town of Woburn and the city of Fall River respectively. In the former case the statute provided that the "town of Woburn shall be liable to pay all damages that shall be sustained by any persons in their property by the taking of any land, water or water rights." In the latter case the act provided that "the city of Fall River shall be liable to pay all damages that shall be sustained by any person or persons in their property by the taking" of water from the pond. In both cases it was held that the petitioner was entitled to recover. The cases of Cowdrey *v.* Woburn, 136 Mass. 409 (1884), and Brickett *v.* Haverhill Aqueduct Co., 142 Mass. 394 (1885), are to the same effect. The water subtracted from the ponds in these four cases belonged to the State in the same sense as the water subtracted in the case of Fay *v.* Salem and Danvers Aqueduct Co., 111 Mass. 27. The public purpose for which the State authorized its taking was precisely the same in each of the five cases; yet the four later decisions show that while there may be no right of the riparian owners on a great pond to recover for an injury to their houses resulting from drawing down the pond, there is a right in the riparian owners on a stream fed by a great pond to the maintenance of its ordinary flow, the question in each case arising as against the public. These cases establish, therefore, that it was the nature of the damage to the

littoral proprietor, and not the nature of the Commonwealth's right in the pond, which prevented a recovery in Fay *v.* Salem and Danvers Aqueduct Co., 111 Mass. 27. Hence that case does not support the position of the majority of the court in the present Watuppa Pond cases.

The cases which have been examined above are the only ones in Massachusetts prior to these Watuppa Pond cases relating to rights in "great ponds," except Hittinger *v.* Eames, 121 Mass. 539 (1877), and Gage *v.* Steinkrauss, 131 Mass. 222 (1881), which simply reaffirm the doctrine that littoral proprietors on "great ponds" have no other right to cut ice thereon than any other person who can legally obtain access to the ponds; Commonwealth *v.* Tiffany, 119 Mass. 300 (1876), which affirms the rights of the Legislature to resign (as it did by Stat. 1869, chap. 384) to the littoral proprietors on ponds between ten and twenty acres in extent all privileges previously enjoyed by the public therein; and Commonwealth *v.* Vincent, 108 Mass. 441, and Cole *v.* Inhabitants of Eastham, 133 Mass. 65, which declare that the Legislature may, with a view to encouraging the cultivation of useful fishes, lease to individuals the exclusive right of fishing in great ponds for a limited period.

The only cases in Maine relating to rights in "great ponds" are Barrows *v.* McDermott, 73 Me. 441 (1882), where the right of the public to fish, and Brastow *v.* Rockport Ice Co., 77 Me. 100 (1885), where the right of the public to cut ice, were affirmed.

We submit, therefore, that at the time of the decision in the last Watuppa Pond suits, there was no case in the books establishing in the public any right in "great ponds," other than a private individual would possess in Massachusetts in a pond of less than twenty acres' area. There are, it is true, certain *dicta* in Massachusetts cases which might seem to favor the view of the majority; but, upon more careful examination, they will hardly be regarded as authorities in its favor.

In The Inhabitants of West Roxbury *v.* Stoddard, 7 Allen, 158, 168 (1863), Mr. Justice Hoar says: "There is no adjudged case in which any right in them [great ponds], adverse to the public, has ever been recognized; and in the cases in which the water has been taken for the supply of towns and cities under legislative authority, we are not aware that any private ownership or title to the water in any town or city has been asserted and maintained as

a ground of damage." That sentence can be naturally and grammatically confined in its application to any "private ownership or title" *in a town;* but, assuming that the court meant its remark to refer as well to "private ownership" in individuals, still the subject-matter of the decision and the whole context show that the "private ownership or title to the water" contemplated by the court was ownership in the water of the pond *quâ pond*, and not in the water itself. The only question at issue, and the undivided attention of the court was upon it, was the right of the public to fish, fowl, boat, bathe, skate, ride in or "upon these ponds" (p. 171), or to take water or ice *from these ponds*, as against any private ownership of any of these uses of the pond; the right of the public, or of any one else, to interfere with the natural flow by appropriating the water was not in question, and it may be added that such appropriation would be inconsistent with the uses named, because destructive of the pond.

Again, in Fay *v.* Salem and Danvers Aqueduct Co., 111 Mass. 27 (1872), Mr. Justice Gray says: "By the law of Massachusetts, great ponds are public property, the use of which for taking water or ice, as well as for fishing, fowling, bathing, boating, or skating, may be regulated or granted by the Legislature at its discretion." We have shown above that the decision in this case contains nothing to support the contention of the existence of any right in the State to drain the pond without making compensation to the riparian owners on the outlet stream. And we may add that Mr. Justice Gray cites in support of his *dictum* only "Anc. Chart. 148, 149; Cummings *v.* Barrett, 10 Cush. 186; West Roxbury *v.* Stoddard, 7 Allen, 158; Paine *v.* Woods, 108 Mass. 160, 169; Commonwealth *v.* Vincent, *ib.* 441; Tudor *v.* Cambridge Water-Works, 1 Allen, 164." All of these authorities have been examined above, and in the last of them the suggestion that the Legislature might authorize the taking of the water of a "great pond" without the payment of compensation was expressly repudiated.

In Trowbridge *v.* Brookline, 144 Mass. 139, 143 (1887), where the petitioner recovered for damages to her well resulting from building a sewer, Mr. Justice W. Allen, delivering the unanimous opinion of the court, says: —

"The decisions in regard to damages occasioned by taking the waters of great ponds are also in point. When the Commonwealth grants a right to take the water, a provision that payment

shall be made for all damages sustained by any person in his property by the taking is held to include damages to mill owners by depriving them of the water, although they would have no right to it as against the Commonwealth or its grantee. Watuppa Reservoir *v.* Fall River, 134 Mass. 267." The force of that *dictum* is removed by the fact that in Watuppa Reservoir *v.* Fall River, 134 Mass. 267, the question under consideration is expressly left open, and by the further fact that Mr. Justice W. Allen was one of the three dissenting judges in the recent Watuppa Pond cases.

We submit, therefore, that prior to this decision the cases in Massachusetts and Maine had recognized in the public only such rights in "great ponds" as any private individual would have in a small pond of which he was the sole littoral proprietor; in other words, that the right of the public in "great ponds" was to their use *quâ* ponds; they established the full right of the public to use, and hence the right in the Legislature to regulate the use of, "great ponds," but not the right to destroy them. There was nothing, therefore, in the earlier cases which should have led the court to the conclusion that the Legislature could authorize a diversion of the water of "great ponds" without payment of compensation for the injuries done thereby to riparian owners on the outlet stream. On the other hand, the language of the ordinance itself does not countenance the position of the majority of the court; the unbroken course of legislative practice was opposed to it; and the earlier decisions, while not necessarily determining the precise point, had established principles which it is difficult to reconcile with the view now advanced. To lay down, under such circumstances, a doctrine which overturns what had previously been regarded as an established rule of property, thus affecting most seriously many valuable water privileges, seems like a near approach to judicial legislation, and that, too, of doubtful expediency. It is a wide departure from the spirit which has in the past led the Commonwealth of Massachusetts to foster its manufacturing industries by every means in its power, and the decision is to be regretted especially, because it comes at a time when all the restraints imposed by the Constitution and the courts are needed to protect private property from the encroachments of the Legislature.

Samuel D. Warren, Jr.
Louis D. Brandeis.

BOSTON.